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Supreme Court of the United States

October Term, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of Knight Newspapers, Inc.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the
Supreme Court of Florida

BRIEF OF DOW JONES & COMPANY, INC. AND THE NEW YORK TIMES COMPANY, AS AMICI CURIAE

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INTEREST OF THE AMICI

Dow Jones & Company, Inc., a Delaware corporation, and The New York Times Company, a New York corporation, pursuant to the written consent of both parties to this action, hereby submit this joint brief, as *amici curiae.*

Dow Jones & Company, Inc. is the publisher of, inter alia, *The Wall Street Journal,* a general newspaper empha-

sizing matters affecting business and finance, with a nationwide daily circulation in excess of 1,250,000; *The National Observer*, a general weekly newspaper with a national circulation of over 500,000; the Ottaway Newspapers, twelve independently edited local newspapers in six states with combined daily circulation in excess of 250,000; and *Barron's National Business and Financial Weekly*, a magazine concentrating on material of interest to the business and financial community, having a weekly circulation of about 200,000.

The New York Times Company is the publisher of *The New York Times*, a daily newspaper with nationwide distribution and with a daily circulation of about 850,000 and a Sunday circulation of about 1,500,000. In addition, the New York Times owns ten newspapers in the State of Florida, with a combined total circulation of about 110,000.

The *amici* are thus two of the broadest and largest publishers of printed media in the United States. This joint brief, as *amici curiae*, is being filed because each of the *amici* is convinced that the decision of the Supreme Court of Florida, if allowed to stand by this Court, will sharply curtail the discussion by newspapers of political and governmental affairs in the State of Florida, and will permit and encourage governmental regulation of the content of printed media to a degree totally inimical to rights guaranteed under the First and Fourteenth Amendments of the Constitution of the United States.

ARGUMENT

Florida Statute § 104.38, held constitutional by the Florida Supreme Court in this case, provides in substance that if "any newspaper in its columns assails the personal character" of a candidate or charges him with "malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose,"

the newspaper must upon request "publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to." The Florida Supreme Court reasoned from the premise that the statute encourages, rather than limits, "robust dissemination of ideas and counterthought." Inasmuch as such encouragement is an object of the First Amendment guarantees, the Court concluded that the statute was constitutional. The Court's premise is clearly wrong. In our view, a careful consideration of the statute's implications strongly suggests that the result of its enforcement will in fact be a sharp limitation on the transmission by the press of information and opinion about Florida politics and government.

The scope of the Florida statute is ambiguous; whether, for example, it applies to news "columns" and signed "columns," or only to editorial "columns" is unclear.* Regardless of its interpretation, however, if the Florida statute is finally determined to be valid, every Florida newspaper editor will be required to pause before publishing material concerning any political personage who may be deemed to be a "candidate." He will necessarily consider each sentence, each phrase, each implication, in an attempt to divine whether a court might construe the language to be "assailing" the candidate's character or charging him with misfeasance or malfeasance. Every politically oriented editorial or letter to the editor will be published with the fear that, as a result of its publication, part of the content of tomorrow's editorial page will be dictated by a politician seeking office. Every page-one story about legislators or other elected officials may carry with it the possibility that the legislator or official will be the author of a portion of a

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* The ambiguities in this criminal statute are numerous and are such as to be unconstitutionally vague. Courts may not cure such an infirmity by judicial construction. *See, e.g., Ashton* v. *Kentucky*, 384 U.S. 195 (1966).

future front page. It is painfully clear that those conditions will lead not to debate, but to a stifling degree of restraint in political reporting by newspapers. Such government-caused self-censorship, particularly in the area of expression about government and politics, is plainly unconstitutional in its effect. *See, e.g., Rosenbloom* v. *Metromedia*, 403 U.S. 29, 52-53 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964).

The *amici* respectfully submit that the error of the Supreme Court of Florida is fundamental and goes beyond its holding with respect to the onerous requirements of this particular Florida statute. The very core of the First Amendment protection of the press is that the government may not forbid a member of the press to publish what it believes should be published, and may never force a member of the press to publish what it concludes should not be published. If it is constitutional for a legislature or court in the "public interest" to tell the press what kinds of election news it must publish, what is to prevent such bodies from dictating what must be published in other public or political areas and thus, what "freedom" to publish will remain? The legislature and Supreme Court of Florida have told the Miami Herald that it must publish the appellee's statement; this the First and Fourteenth Amendments forbid them to do.

The Florida court's holding is contrary to the recent decisions of other courts throughout the country. In *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971), the Court of Appeals held that the defendant was not required to carry an advertisement for a motion picture where the newspaper disapproved of the text of the ad. The court said:

> "Appellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper." 440 F.2d at 135.

In *Chicago Joint Bd., Amal. Cloth. Wkrs.* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), the Court of Appeals held that newspapers were not required to take advertising explaining a union's position with respect to the sale of imported clothing by a large department store. Quoting the District Court, the Seventh Circuit said:

> " '[T]he function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation.' " 435 F.2d at 474.

Seven months ago, the Supreme Judicial Court of Massachusetts, in an advisory opinion to the State legislature, held that a proposed statute requiring newspapers that publish advertisements for political candidates to publish paid advertisements for competing candidates would be unconstitutional. *Opinion of the Justices to the Senate* ____ Mass. ____, 298 N.E.2d 829 (1973). The Court observed that the proposed legislation

> "presents a paradox because its enactment, instead of achieving a fairer dissemination of political advertising, may produce the chilling effect of discouraging newspapers and other affected publications from accepting any political advertisements. A newspaper or other publication of general circulation may decide to publish no political advertisements on an election issue rather than expose itself to a commitment to publish all responsive advertisements." 298 N.E.2d at 833-834.

The Court concluded that the statute was unconstitutional because the

> "compulsion to publish all responsive political advertisements, applicable to all newspapers and other pub-

> lications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published. . . . Indeed, no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement." 298 N.E.2d at 835.

And last term, in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973), Mr. Chief Justice Burger writing for this Court said:

> "The power of a privately owned newspaper to advance its own political, social and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers." 412 U.S. at 117.

In *Pittsburgh Press Co.* v. *The Pittsburgh Commission on Human Relations,* 413 U.S. 376, 391 (1973), this Court reaffirmed unequivocally to the press "the protection afforded to editorial judgment and the free expression of views . . . [on] issues, however controversial."

Also, see *Mills* v. *Alabama,* 384 U.S. 214 (1966), in which this Court underscored the constitutional right of newspapers to "urge people to vote one way or another in a publicly held election." 384 U.S. at 220.

The *amici* are committed to a system which fosters dissemination of expression by all elements of society. Editorially, they have published in the pages of their newspapers information from many sources and a multitude of viewpoints which vary from those held by their publishers

and editors. But while they believe in the robust debate of which the Florida court speaks, they are convinced that in the long run the heavy hand of the government will stifle, not encourage, such discourse.

In our view this statute undermines the function of the press in our democratic society, which function was cogently described in *Mills* v. *Alabama, supra,* 384 U.S. at 219:

> " . . . [T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

The predicate to obtaining and protecting free and open discussion of matters of legitimate public interest and concern, as recognized in the opinions referred to above, is the prohibition of federal and state governments from ordering what shall be published by the press. The writers of our Constitution explicitly recognized this when they chose, as their sole means of insuring a system based upon the free exchange of ideas, the command:

> "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."

The rampart between the press and the overwhelming powers of government must not be breached. Once the government is within the gates, no matter what its motivation or pretext, it may never be removed.

CONCLUSION

It is respectfully urged that this Court reverse the decision of the Florida Supreme Court.

Respectfully submitted,

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February 27, 1974

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Dow Jones & Company, Inc. and The New York Times Company, as *Amici Curiae,* have been served on this 27th day of February, 1974, upon the attorneys for the parties and for *Amici Curiae* by depositing same in a wrapper, postage prepaid, in a depository of the U. S. Postal Service, addressed as follows:

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